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ASSISTED AND SUBSTITUTED DECISIONS

**Decision-making by and for people
with a decision-making disability**

Report No 49
Volume 3

Summary of Recommendations

Queensland Law Reform Commission
June 1996

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Previous Queensland Law Reform Publications on this Reference:

Steering Your Own Ship?, Queensland Law Reform Commission Issues Paper MP1, August 1991.

Assisted and Substituted Decisions: Decision-making for People Who Need Assistance Because of Mental or Intellectual Disability, Queensland Law Reform Commission Discussion Paper WP38, July 1992.

Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability, Queensland Law Reform Commission Draft Report WP43, February 1995.

To: The Hon Denver Beanland MLA
Attorney-General and Minister for Justice

In accordance with section 15 of the *Law Reform Commission Act 1968*, the Commission is pleased to present its report on Assisted and Substituted Decisions.

The Report is accompanied by preliminary draft legislation prepared by the Office of Parliamentary Counsel. The Commission hopes to be involved in any further development of the Draft Bill before it is introduced into Parliament.



The Hon Justice G N Williams
Chairperson



Dr J A Devereux
Member



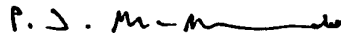
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PREFACE

There are well over 100,000 adult members of the Queensland community who have a condition which may affect their decision-making capacity.

As at 1993, there were, at a conservative estimate, over 16,600 Queenslanders aged twenty and upwards with an intellectual disability of congenital or early childhood origin.¹

There are also, at a conservative estimate, approximately 5,000 people who have a profound or severe disability related to head injury. Traumatic brain injuries are the cause of 200-300 hospital admissions in a population of 100,000 every year in Western countries. The incidence of severe head injury is approximately 5% to 10% of this case load. More than 100 new cases present to the Specialist Head Injury Rehabilitation Unit at Princess Alexandra Hospital each year.²

Between 5 and 10 per cent of the aged population are affected by moderate to severe dementia. There are now over 15,000 people with dementia in Queensland. The risk of dementia increases with age. Because our overall population is ageing, those who are most likely to develop dementia will become proportionately an even larger segment of the community. It is projected that, by the end of the next fifteen years, 32,000 people in Queensland will have dementia.³

In addition, it is estimated that, in any one year, 2.9% of the adult population will have a severe mental illness. Based on population projections for 1996, this means that about 68,300 Queenslanders will be affected.⁴

Although the existence of a particular condition does not necessarily mean that a person is incapable of making his or her own decisions, a significant proportion of people with a decision-making disability may need assistance to make decisions or need a substitute decision-maker to act on their behalf. In the year from 1 July 1994 to 30 June 1995, the Intellectually Disabled Citizens Council received 1,734 applications for assistance or review. The Legal Friend issued 2,195 consents for medical or allied health care - an increase of 26% on the previous year. Of these consents 80% were issued in emergency circumstances.⁵ During the same period, the Public Trustee opened 578 new files for clients requiring protective management

¹ Information provided by the Australian Institute of Health & Welfare. It is based on unpublished 1993 data belonging to the Australian Bureau of Statistics. The accuracy of the information has been verified for the Commission by the Australian Bureau of Statistics. The figure refers only to those people in households who reported needing assistance in one of nine categories including, for example, self care, health care and personal affairs.

² Information provided by Headway Queensland Inc.

³ Alzheimer's Disease and Related Disorders Society (Australia), *A Fair Go for Dementia* (1990).

⁴ Information supplied by Queensland Mental Health, based on the Queensland Mental Health Plan 1994.

⁵ Intellectually Disabled Citizens Council, *Annual Report 1994-1995*.

of their financial affairs, bringing the total number of management clients to almost 5,000.⁶

Queensland is the only State or Territory in Australia which does not have a comprehensive legislative scheme providing for these issues. The present law in Queensland is outdated, inflexible and inadequate to meet the needs of people with a decision-making disability, their families and their carers. Its effect is often intrusive, resulting in the appointment of the Public Trustee and the Legal Friend as decision-makers in situations where it is unnecessary. In other situations, family members risk incurring legal liability for making decisions on behalf a person with a decision-making disability when they have no authority to do so.

In this Report, the Queensland Law Reform Commission puts forward its recommendations for a new system, based on several years of research into models in other jurisdictions and, most importantly, extensive consultation with individuals, groups and organisations affected by the existing scheme.

The interests of people with a decision-making disability must always be the first priority of such legislation, but recognition must also be given to the valuable role performed by many families and carers.

The main thrust of the Commission's recommendations is that outside intervention should be used only when it is necessary to promote and protect the rights and welfare of a person who lacks the capacity to make his or her own decisions. The Commission has recommended the establishment of a specialist tribunal to determine assisted and substituted decision-making issues which cannot be resolved by less formal means or which arise because there is a risk to the personal well being or financial security of someone with a decision-making disability.

The Commission has also recommended the creation of two independent statutory offices - one to act as a systemic advocate on behalf of people with a decision-making disability and one to act as decision-maker of last resort in relation to personal welfare, lifestyle and health care matters. The Public Trustee would continue as decision-maker of last resort for financial decisions.

The Commission recognises that its recommendations will have some resource implications for government. The Commission has not undertaken a full costing analysis of its proposals but offers the following comments:

- . Greater recognition of family or other private decision-makers will mean fewer applications for appointment of a decision-maker and reduced demand for decision-making services provided by the government.
- . The establishment of a tribunal to deal only with those cases where there is a need for outside intervention will result in far more effective use of resources than the existing mechanisms.

⁶ The Public Trustee of Queensland, 1995 Annual Report.

- . An accessible tribunal will protect disadvantaged and vulnerable members of our community.
- . A comprehensive legislative scheme will ensure that the decision-making needs of all people with a decision-making disability are met, regardless of the cause of their disability.

Decision-making disability is not just something that happens to other people. It has the potential to seriously disrupt the lives of members of all Queensland families. Anyone's partner can be involved in an accident; anyone's parent can develop dementia or have a stroke; anyone's young adult son or daughter can be injured.

The law must provide a simple and inexpensive way of protecting the rights of people with a decision-making disability and of meeting their decision-making needs. It will undoubtedly be necessary to monitor in an ongoing way the operation of any legislation implementing the Commission's recommendations and the Commission hopes to be asked to perform a role in that process.

SUMMARY OF RECOMMENDATIONS

This summary of recommendations sets out the recommendations of the Queensland Law Reform Commission in its Report No. 49: *Assisted and Substituted Decisions*. The Report proposes a comprehensive legislative scheme dealing with decision-making by and for people with a decision-making disability.

CHAPTER 4: PRINCIPLES

The Commission recommends that there should be legislative principles which are binding on every person who exercises a power or performs a duty or a function under the legislation.

Presumption of competence

The Commission recommends that the legislation be based on the principle that a person is presumed to have capacity to make his or her own decisions.

People with disabilities have the same human rights as others

The Commission recommends that the legislation provide that:

- . the right to the same basic human rights regardless of a particular person's decision-making capacity must be recognised and taken into account; and
- . the importance of empowering a person to exercise the person's basic human rights must also be recognised and taken into account; and
- . a person's right to respect for the person's human worth and dignity as an individual must be recognised and taken into account.

Valued social role

The Commission recommends that the legislation provide that:

- . a person's right to be a valued member of society must be recognised and taken into account; and
- . the importance of encouraging and supporting a person to perform social roles valued in society must be taken into account.

(ii)

Participation in community life

The Commission recommends that the legislation provide that the importance of encouraging and supporting a person to live a life in the general community and to take part in activities enjoyed by the general community must be taken into account.

Encouragement of self-reliance

The Commission recommends that the legislation provide that the importance of encouraging and supporting a person to achieve the person's maximum physical, social, emotional and intellectual potential and to become as self-reliant as practicable must be taken into account.

Maximum participation and minimal limitations

The Commission recommends that the legislation provide that:

- . a person's right to participate, to the greatest extent practicable, in decisions affecting the person's life must be recognised and taken into account;
- . the importance of preserving, to the greatest extent practicable, a person's right to make his or her own decisions must be taken into account;
- . a person must be given support and access to information to enable the person to participate in decisions that affect the person's life;
- . to the greatest extent practicable, the views and wishes of a person for whom a decision is being made must be sought and taken into account;
- . if, from a person's previous actions, it is reasonably practicable to work out what a person's views and wishes would be, a person or other entity performing a function or exercising a power under the legislation must take into account what the person or other entity considers would be the person's views and wishes;
- . a person or other entity in performing a function or exercising a power under the legislation must:
 - . act in the way that is least restrictive of the person's rights; and
 - . act in a way that is consistent with the person's proper care and protection.

(iii)

Recognition of existing relationships

The Commission recommends that the legislation provide that the importance of maintaining a person's existing supportive relationships be taken into account.

Recognition of background and beliefs

The Commission recommends that the legislation provide that:

- . the importance of maintaining a person's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account; and
- . in particular, the importance of maintaining the cultural and linguistic environment and values of a person who is a member of an Aboriginal or Islander community should be taken into account.

Recognition of characteristics and needs

The Commission recommends that the legislation provide that assistance given to a person to make a decision and a decision made for or about a person should be appropriate to the person's characteristics and needs.

Community responsibility

The Commission recommends that the legislation provide that the community is encouraged to apply and promote the legislative principles.

Confidentiality

The Commission recommends that the legislation provide that a person or other entity who performs a function or exercises a power under the legislation must respect the right of a person with a decision-making disability to confidentiality of information about the person.¹

¹ See United Nations Organisation, *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, Principle 6.

CHAPTER 5: TYPES OF DECISION

Personal decisions

The Commission recommends that the legislation provide that the "personal decisions" which a decision-maker may be authorised to make include:

- . where the person is going to live;
- . who is going to live with the person;
- . whether the person should work and, if so, the kind and place of work, and the employer;
- . what education or training the person will receive;
- . whether the person should apply for any licence or permit; and
- . normal day-to-day decisions on behalf of the person including, for example, decisions about diet and dress.

Excluded personal decisions

The Commission recommends that the legislation provide that:

- . a decision-maker should not be authorised to make an "excluded personal decision";
- . an "excluded personal decision" for a person whose decision-making capacity is impaired is a decision about one or more of the following -
 - . making or revoking the person's will;
 - . making or revoking the person's enduring power of attorney or advance directive;
 - . exercising the person's right to vote in a local government, State or Commonwealth election or referendum;
 - . consenting to adoption of a child of the person;
 - . consenting to the person's marriage.

(v)

Health care decision

The Commission recommends that the legislation provide that:

- . "health care" is any care, treatment, service or procedure -
 - (a) to maintain, diagnose or treat a person's physical or mental condition; and
 - (b) carried out by, or under the supervision of, a health care provider;
- . "health care" does not include -
 - (a) the administration of a pharmaceutical drug if -
 - (i) a prescription is not needed to obtain the drug; and
 - (ii) the drug is normally self-administered; and
 - (iii) the administration is for a recommended purpose and at a recommended dosage level; or
 - (b) first aid treatment; or
 - (c) a non-intrusive examination made for diagnostic purposes;
- . a "health care decision" of or for a person is a decision about health care (other than special consent health care) of the person;
- . if a person is terminally ill or in a state of permanent or persistent unconsciousness, a health care decision of or for the person does not include a decision to withhold or withdraw life-sustaining measures;
- . "life sustaining measure" means medical treatment that supplants or maintains the operation of vital bodily functions that are temporarily or permanently incapable of independent operation, and includes assisted ventilation, artificial nutrition and hydration and cardiopulmonary resuscitation;
- . the proposed scheme does not affect the common law relating to the withholding or withdrawal of life-sustaining measures.

Special consent health care decisions

The Commission recommends that the legislation should provide that:

(vi)

"special consent health care" for a person who lacks capacity to make his or her own decision is:

- (a) removal of tissue from the person for donation to someone else;
- (b) sterilisation of the person;
- (c) termination of a pregnancy of the person;
- (d) participation by the person in research or experimental health care;
- (e) psychiatric health care prescribed under the regulations;
- (f) other health care prescribed under the regulations.

Financial decision

The Commission recommends that the legislation provide that:

a "financial decision" includes a decision (other than a decision about a legal matter) about the possession, custody, control or management of a person's property;

a "financial decision" includes a decision about one or more of the following:

- (a) paying maintenance and accommodation expenses for the person and the person's dependants;
- (b) paying the person's debts;
- (c) to the extent that the decision is not a decision about a legal matter, receiving and recovering money payable to the person;
- (d) discharging a mortgage over the person's property;
- (e) paying rates, taxes, insurance premiums or other outgoings for the person's property;
- (f) insuring the person or the person's property;
- (g) otherwise preserving or improving the person's estate;
- (h) carrying on any trade or business of the person;
- (i) performing contracts entered into by the person;

(vii)

- (j) entering into an authorised real estate transaction for the person;
- (k) with the tribunal's approval, entering into a real estate transaction for the person which is not an authorised real estate transaction;
- (l) investing for the person in authorised investments;
- (m) with the tribunal's approval, investing for the person in investments that are not authorised investments;
- (n) entering into an authorised security transaction for the person;
- (o) with the tribunal's approval, entering into a security transaction for the person which is not an authorised security transaction;
- (p) taking up rights to issues of new shares, or options for new shares, to which the person becomes entitled by the person's existing shareholding (whether or not the shares are an authorised investment).

The Commission recommends that the legislation provide that:

- . an "authorised real estate transaction" means -
 - . the purchase of real estate for the purpose of:
 - (a) providing a home for the person or the person's dependants;
 - (b) protecting the value of the person's existing real property;
 - . the sale of any of the person's real estate for the purpose of providing a home for the person or any dependants of the person.
- . an "authorised security transaction" means -
 - using the person's property as security for:
 - (a) a loan to provide for the reasonable needs of the person or the person's dependants;
 - (b) a mortgage to purchase a home for the person or the person's dependants.

Decision about a legal matter

The Commission recommends that the legislation provide that:

- . a "decision about a legal matter" is a decision about a legal matter of a civil or criminal nature involving a person or the person's property, including:
 - . a decision about obtaining legal services for the person, including information about the person's legal rights; and
 - . a decision about using legal services to undertake a transaction;
 - . a decision about giving instructions to commence, continue, compromise, defend or settle any legal proceedings on the person's behalf.

The Commission recommends that a decision-maker who engages in a legal proceeding on behalf of a person with impaired decision-making capacity should incur liability for costs awarded against the person to any other party to the proceeding, but should be entitled to an indemnity from the person.

CHAPTER 6: ENDURING POWERS OF ATTORNEY (CHOOSING YOUR OWN DECISION-MAKER)

The Commission recommends that legislation providing for enduring powers of attorney should be included in a legislative scheme dealing with decision-making by and for people with a decision-making disability.

Jurisdiction over enduring powers of attorney

The Commission recommends that:

- . the Supreme Court retain its inherent jurisdiction over enduring powers of attorney;
- . the proposed legislation confer jurisdiction on both the Supreme Court and the tribunal in relation to enduring powers of attorney;
- . the Supreme Court may, if it considers appropriate, transfer a proceeding about an enduring power of attorney to the tribunal;
- . the tribunal may, if it considers appropriate, transfer a proceeding about an enduring power of attorney to the Supreme Court;

(ix)

- . the tribunal be given power, either on its own motion or on the application of a participant in either proceeding, to stay a hearing about an enduring power of a attorney if a concurrent proceeding has been brought in the Supreme Court;
- . the tribunal have interim power to appoint a decision-maker pending the resolution of litigation in the Supreme Court concerning an enduring power of attorney.

Decisions which an enduring power of attorney can authorise

The Commission recommends that the legislation provide that a person who makes an enduring power of attorney may use it to authorise a chosen decision-maker to make personal decisions, health care decisions, financial decisions and decisions about legal matters.

Decisions which an enduring power of attorney cannot authorise

The Commission recommends that the legislation provide that the maker of an enduring power of attorney should not be able to delegate to a chosen decision-maker power to make excluded personal decisions or special consent health care decisions.

Limitation of chosen decision-maker's authority

The Commission recommends that the legislation provide that, in an enduring power of attorney, the person who makes the enduring power of attorney may limit the power given to a chosen decision-maker and state instructions for a chosen decision-maker to apply when making decisions.

Capacity to make an enduring power of attorney

The Commission recommends that the legislation provide that a person making an enduring power of attorney must understand -

- . that in the power of attorney, the person may specify or limit the power to be given to a chosen decision-maker and instruct a chosen decision-maker about the exercise of the power;
- . when the power will begin;

(x)

- . that if the power for a type of decision begins, the chosen decision-maker will make, and have full control over, all the person's decisions of the type unless limitations or instructions are included in the power of attorney;
- . that the power the person has given will continue even if the person becomes a person with impaired decision-making capacity;
- . that the person may revoke the power of attorney at any time the person is capable of making another enduring power of attorney;
- . that at any time the person is not capable of revoking the enduring power of attorney, the person will not be able to oversee the use of the power.

The Commission further recommends that the document creating the power incorporate a series of prescribed notes explaining the matters which the person making the enduring power of attorney is required to understand in order to have capacity to grant the power.

The role of the witness

The Commission recommends that the form for granting an enduring power of attorney should contain a warning to the witness that it may, in the future, be necessary for the witness to provide information about the capacity of the person who is making the enduring power of attorney and that the witness should, if necessary, make appropriate enquiries.

The Commission recommends improved training for Justices of the Peace and Commissioners for Declarations in relation to their role in witnessing enduring powers of attorney.²

Inducing execution of an enduring power of attorney

The Commission recommends that the legislation should provide that:

- . it is an offence to dishonestly induce a person to make an enduring power of attorney;

²

The Commission is concerned that the information provided to Justices of the Peace and Commissioners for Declarations is inadequate and, in some respects, incorrect. Manual One: *Administrative Duties of Commissioners for Declarations and Justices of the Peace* (July 1993), published by the Department of Justice and Attorney-General (now the Department of Justice) instructs a witness who is doubtful about the capacity of a person making an enduring power of attorney to "insist first that a medical practitioner decide whether the donor is capable of understanding the power of attorney process." (At 73) However, the manual contains no information for the witness as to the level of capacity required to make an enduring power of attorney. Further, the manual states that "A Commissioner for Declarations, or a Justice of the Peace, or a medical practitioner, must witness the signatures of both the donor and the agent."

(xi)

- . a person found guilty of the offence may be ordered to pay a substantial fine and/or sentenced to a term of imprisonment.

Forms

The Commission recommends that the legislation contain alternative short form and long form versions of the form for making an enduring power of attorney.

Signature

The Commission recommends that the legislation provide that:

- . another person may sign an enduring power of attorney on behalf of the person making the power;
- . the person who signs should not be a witness to the enduring power of attorney or a person who is named in the enduring power of attorney as a chosen decision-maker;
- . the witness be required to certify that, in the presence of the witness, the person making the enduring power of attorney instructed the other person to sign the document on his or her behalf;
- . the other person signed the document in the presence of both the witness and the person making the enduring power of attorney; and
- . the person making the enduring power of attorney appeared to the witness to understand the matters necessary to make an enduring power of attorney.

Who may witness an enduring power of attorney

The Commission recommends that the legislation provide that an enduring power of attorney must be signed by a witness who is:

- . a Justice of the Peace, a Commissioner for Declarations or a lawyer; and
- . not the person signing the enduring power of attorney on behalf of the person making it;
- . not a chosen decision-maker of the person making the enduring power of attorney; and
- . not a relation of the person making the enduring power of attorney or the

(xii)

chosen decision-maker; and

- . if the enduring power of attorney gives power to make a health care decision, not a current health care provider for the person making the enduring power of attorney.

Appointment of more than one chosen decision-maker

The Commission recommends that the legislation provide that a person who makes an enduring power of attorney be able to nominate:

- . different chosen decision-makers for different purposes;
- . alternative chosen decision-makers so that power is given to a particular chosen decision-maker only in a stated circumstance;
- . successive chosen decision-makers so that power is given to a particular chosen decision-maker only when power given to another chosen decision-maker ends.

The Commission recommends that the legislation provide that a person who makes an enduring power of attorney may nominate:

- . joint or joint and several chosen decision-makers; or
- . two or more joint chosen decision-makers, being a number less than the total number of nominated decision-makers.

The Commission recommends that the legislation provide that, if a person who nominates more than one chosen decision-maker for a decision or kind of decision fails to specify how the authority is to be exercised, then the chosen decision-makers should be taken to have been appointed jointly.

The Commission recommends that the legislation provide that, where a person who makes an enduring power of attorney appoints more than one chosen decision-maker to act jointly, the power should not be invalidated by the inability of any of the chosen decision-makers to continue to act, but should continue to confer authority on the remaining chosen decision-makers, if more than one, to act jointly, until the last of the chosen decision-makers is unable to act.

Corporate chosen decision-makers

The Commission recommends that the legislation provide that:

- . eligibility for corporate attorneys should be restricted to the Public Trustee

(xiii)

and to statutory trustee companies; and

- . the authority of the Public Trustee or a trustee company to act under an enduring power of attorney should be limited to exclude decisions about the personal care and welfare of the person who made the enduring power of attorney.

The Commission recommends that the legislation provide that a person who makes an enduring power of attorney may nominate the Adult Guardian as chosen decision-maker for personal and health care decisions.

Professional care givers

The Commission recommends that a paid carer or a current health care provider for a person should not be eligible for appointment as a chosen decision-maker for that person.

Power to decide validity

The Commission recommends that the legislation provide that the Supreme Court and the tribunal each have power to:

- . determine whether a person who has granted an enduring power of attorney had the necessary degree of capacity at the time the power was made; and
- . if it is satisfied that the person did not have the necessary degree of capacity at the time the power was made, declare the enduring power of attorney invalid; and
- . declare an enduring power of attorney invalid on other grounds; and
- . if it is satisfied that an enduring power of attorney is not valid, appoint, in the same proceeding, a decision-maker for the person who made the enduring power of attorney, if it considers it appropriate to do so.

Effect of invalidity

The Commission recommends that the legislation provide that:

- . a chosen decision-maker who acts in reliance on an invalid enduring power of attorney is protected from personal liability, provided that the chosen decision-maker did not know or have reason to believe that the power was invalid; and

(xiv)

a third party who deals with a chosen decision-maker in reliance on an enduring power which is invalid is protected, provided that the third party did not know or have reason to believe that the enduring power of attorney was invalid.

When an enduring power of attorney comes into effect

The Commission recommends that the legislation provide that:

- . an enduring power of attorney for personal or health care decisions is not to begin unless the person who made the power has lost capacity to make the decision;
- . in relation to decisions about the management of money or property of the person who made the enduring power of attorney, or about legal matters involving the person or the person's money and property, the person be able to specify whether the power is to begin immediately, or on a specified date or occasion such as, for example, while the person is overseas or when the person has lost decision-making capacity;
- . if the person who made an enduring power of attorney giving power to make financial decisions or decisions about legal matters failed to specify when the power is to begin, it should begin immediately the document creating the power is executed.

Impaired capacity declaration

The Commission recommends that the legislation provide that a chosen decision-maker or any other interested person may apply for a declaration that the person who made the enduring power of attorney has impaired decision-making capacity for a decision or kind of decision.

Supervision of chosen decision-makers

The Commission recommends that the legislation provide that both the Supreme Court and the tribunal have supervisory jurisdiction over chosen decision-makers appointed by enduring powers of attorney.

Appointment of a monitor

The Commission recommends that the legislation should not provide for the appointment of a monitor to supervise the exercise of an enduring power of attorney by a chosen decision-maker.

The Commission recommends that the form for creating an enduring power of attorney include a note to the person making the enduring power about the extra protection offered by a joint appointment.

Capacity to revoke

The Commission recommends that the legislation provide that, in order to revoke an enduring power of attorney, the person who made the power must understand the matters necessary to make the same power.

Method of revocation

The Commission recommends that the legislation provide that:

- . revocation of an enduring power of attorney should be:
 - . in writing; and
 - . signed and witnessed in the same way as the power is executed;

and that if a person revokes an enduring power of attorney, the person must take reasonable steps to advise all chosen decision-makers under the power of the revocation.

Grounds for revocation

The Commission recommends that the legislation provide that, to the extent that an enduring power of attorney gives decision-making power to a spouse, the enduring power of attorney should be revoked by subsequent divorce.

The Commission recommends that the legislation provide that:

- . if a person marries after making an enduring power of attorney, the enduring power of attorney is revoked unless
 - . a contrary intention is expressed in the enduring power of attorney; or
 - . the marriage is to the person appointed as the person's decision-maker under the enduring power of attorney, in which case the enduring power of attorney is revoked to the extent it gives power to a person other than the person who becomes the person's spouse.

The Commission recommends that the legislation provide that an enduring power of attorney should be revoked to the extent that the person who granted the

power, having the necessary capacity to do so, subsequently makes another enduring power which gives power to make the same decisions to a different chosen decision-maker, or makes an advance directive for health care which covers the same subject matter.

Warning about revocation

The Commission recommends that the form for executing an enduring power of attorney should include a warning to both the person making the power and the person's chosen decision-makers about the events which operate to revoke the authority given by the power.

Substituted revocation

The Commission recommends that the legislation provide that a substitute decision-maker cannot be authorised to revoke an enduring power of attorney on behalf of a person who has lost capacity to revoke the power personally and that, once a person who has made an enduring power of attorney has lost capacity to revoke it, the power can be revoked only by the tribunal or by the Supreme Court.

Inducing revocation

The Commission recommends that the legislation provide that:

- . it is an offence to dishonestly induce a person to revoke an enduring power of attorney;
- . a person found guilty of the offence may be ordered to pay a substantial fine and/or sentenced to a term of imprisonment.

Protection from effect of revocation

The Commission recommends that the legislation provide that if a person revokes an enduring power of attorney, a chosen decision-maker who purports to exercise the power and who does not know the power has been revoked does not incur any liability to the person or to anyone else because of the revocation.

The Commission further recommends that the legislation provide that knowledge of revocation includes knowledge of the happening of an event having the effect of revoking the power, and having reason to believe that the power has been revoked.

The Commission recommends that the legislation provide that, if an enduring power of attorney has been revoked, a third party who deals with a chosen decision-maker and who does not know or have reason to believe that the power has been revoked should be protected.

Enduring power of attorney made in another jurisdiction

The Commission recommends that the legislation provide that, if an enduring power of attorney is made in another State or Territory and the enduring power of attorney complies with the requirements in that State or Territory in relation to an enduring power of attorney, then, to the extent that the powers given by the enduring power of attorney could validly have been given in Queensland, it should be treated as if it had been made in Queensland and complied with the requirements of the Queensland legislation.

The Commission recommends that the legislation provide that, if a person's enduring power of attorney has been made in another State or Territory and does not comply with the requirements in that State or Territory in relation to enduring powers of attorney:

- . a chosen decision-maker who purports to act under the enduring power and who does not know or have reason to believe that there has been non-compliance should not incur any liability because of the non-compliance; and
- . a person who deals with a chosen decision-maker who purports to exercise power under the enduring power should also be protected if the person did not know or have reason to believe there had been non-compliance.

Relationship between enduring power of attorney and decision-making order

The Commission recommends that the legislation provide that, if a person has made an enduring power of attorney, the tribunal should not make an order appointing a decision-maker for the person unless there are grounds for removing a chosen decision-maker or revoking the enduring power of attorney.

The Commission recommends that the legislation provide that if a person makes an enduring power of attorney and the proposed tribunal subsequently, without reference to the enduring power of attorney, appoints a decision-maker with the same power as a chosen decision-maker under the enduring power of attorney, the appointed decision-maker and a person who, without knowledge of the enduring power of attorney, deals with the appointed decision-maker should be protected.

The Commission further recommends that the legislation provide that:

(xviii)

- . if the tribunal has made a decision-making order for a person, the person should not be able to appoint a chosen decision-maker to make decisions which have been included in that order while the order is in operation;
- . if the person has the necessary capacity, the person should be able to make an enduring power of attorney appointing a chosen decision-maker to make decisions about matters not included in the tribunal order.

Registration

The Commission recommends that the legislation provide that:

- . enduring powers of attorney which confer authority to deal with real property or to make financial decisions be registrable;
- . the Registrar of Titles have power to register a certified extract from an enduring power of attorney which includes power to make other decisions;
- . registration of an enduring power of attorney for financial decisions has effect only in relation to dealings in real property.

The Commission recommends that:

- . enduring powers of attorney for decisions other than financial decisions should not be registrable;
- . there should not be a compulsory system of registration for all enduring powers of attorney.

The Commission recommends that the legislation provide that if an instrument creating an enduring power of attorney has been registered it shall not, unless a different intention appears from the instrument, cease to confer on a decision-maker any authority to deal with land on behalf of the person who made the power until the enduring power of attorney is deregistered.

The Commission recommends that the legislation provide that if a request to register an enduring power of attorney has been lodged under the *Land Title Act 1994 (Qld)* and the enduring power of attorney is revoked:

- . by formal revocation by the person who made it, the person must take reasonable steps to register the revocation;
- . by a later enduring power of attorney of the person covering the same subject matter, the person who made the enduring power of attorney must take reasonable steps to register the revocation;

- . by the death of the person who made the enduring power of attorney, the person's personal representatives must take reasonable steps to register the revocation;
- . by any other means, the following people may register the revocation upon presentation of sufficient evidence that the revocation has occurred:
 - . the person who made the power;
 - . a chosen decision-maker under the power;
 - . a decision-maker appointed by the tribunal;
 - . after the death of the chosen decision-maker, the chosen decision-maker's personal representative;
 - . the registrar of the tribunal;
 - . a person directed by the Supreme Court to register the revocation.
- . the enduring power of attorney is declared invalid by the tribunal or the Supreme Court, or the Court or tribunal makes another order affecting the enduring power of attorney:
 - . the registrar of the tribunal or a person directed by the Supreme Court, must take reasonable steps to register the declaration or the order; and
 - . the Court or the tribunal may make an order about the costs of registering the declaration or order;
- . the power given by the enduring power of attorney is no longer exercisable, the person who made the enduring power of attorney must take reasonable steps to deregister the enduring power of attorney.

The Commission recommends that, if a system of compulsory registration is established, the registering authority should be the tribunal recommended by the Commission in Chapter 8 of the Report.

Property Law Act 1974 (Qld)

The Commission recommends that the legislation provide that an enduring power of attorney which is made in accordance with the prescribed form, notwithstanding that it is not expressed to be executed under seal, is for all purposes to be taken to be, and to have effect as, a deed.

The Commission recommends that the legislation provide that:

- . an enduring power of attorney may be registered for the purpose of dealing with real property;
- . an enduring power of attorney expressed to take effect on the happening of a stated occasion is not registrable without proof that the occasion has occurred;
- . if the stated occasion is the incapacity of the person who made the power, the power is not registrable unless the tribunal has declared that the person does not have decision-making capacity for the decisions included in the power or there is a certificate from two medical practitioners that the person does not have decision-making capacity for the decisions included in the power.

The Commission recommends that the legislation include a provision equivalent to section 172 of the *Property Law Act 1974 (Qld)*

The Commission recommends that the legislation include a provision equivalent to section 175 of the *Property Law Act 1974 (Qld)*.

Land Title Act 1994 (Qld)

The Commission recommends that the *Land Title Act 1994 (Qld)* be amended as follows:

- . In section 4, the following definitions be inserted:
 - "*power of attorney*" includes an enduring power of attorney;
 - "*enduring power of attorney*" means an enduring power of attorney executed in accordance with the provisions of the legislation proposed by the Commission or, for an enduring power of attorney executed prior to the commencement of that legislation, an enduring power of attorney executed in accordance with the provisions of the *Property Law Act*.
- . Section 132A be amended to include reference to a decision-maker appointed by the tribunal;
- . Section 133(1) be amended to require the Registrar to also keep a register of decision-makers appointed by the tribunal;
- . Section 137 be amended to refer to an appointed or chosen decision-maker under the proposed legislation, or to an attorney under an enduring power

of attorney made before the proposed legislation comes into effect.

Land Act 1994 (Qld)

The Commission recommends that the *Land Act 1994 (Qld)* be amended as follows:

- . Section 385 be amended to refer to a decision-maker chosen or appointed under the proposed legislation or to an attorney under an enduring power of attorney made before the proposed legislation comes into effect.

CHAPTER 7: APPOINTMENT OF A DECISION-MAKER

Grounds for appointment

The Commission recommends that the legislation provide that a decision-maker be appointed for a person with a decision-making disability only if:

- . the person needs to make a decision, or is likely to make a decision which involves or is likely to involve substantial risk to the person's health, welfare or property; and
- . the person is not capable, whether with or without assistance, of:
 - . understanding the nature and foreseeing the effects of the decision; or
 - . communicating the decision in some way even though all practicable methods of communicating with the person have been attempted; and
- . without an appointment, the person's needs will not be adequately met or the person's interests will not be adequately protected.

Onus and standard of proof

The Commission recommends that the civil standard of proof should apply.

Who may be appointed

The Commission recommends that the legislation provide that a person may be appointed as a decision-maker for a person with impaired decision-making

capacity only if the person is:

- . a relation or a close friend of the person who is at least eighteen years of age; or
- . another individual who is at least eighteen; or
- . for a personal or health care decision, the Adult Guardian; or
- . for a financial decision or a decision about a legal matter a statutory trustee company or the Public Trustee.

Criteria for eligibility

The Commission recommends that the legislation provide that, in deciding whether a person is appropriate for appointment as a decision-maker for a person whose decision-making capacity is impaired, the tribunal must consider the following matters:

- . the general principles and whether the proposed decision-maker is likely to comply with them;
- . if the appointment is for a health care decision, the health care principle and whether the proposed decision-maker is likely to comply with it;
- . whether the person's and the proposed decision-maker's interests are likely to conflict;
- . whether the person and the proposed decision-maker are compatible;
- . if more than one decision-maker is to be appointed, whether the proposed decision-makers are compatible;
- . whether the proposed decision-maker would be available and accessible to the person;
- . the proposed decision-maker's suitability and competence to perform functions and exercise powers under an appointment order.

The Commission recommends that the legislation provide that:

- . the fact that a proposed decision-maker is a relation of the person does not, of itself, mean the proposed decision-maker's and the person's interests are likely to conflict; and
- . the fact that, on a person's death, a proposed decision-maker may be a

beneficiary of the person's estate does not, of itself, mean that the proposed decision-maker's and the person's interests are likely to conflict.

Disqualification from appointment

The Commission recommends that the legislation provide that:

- . in considering the suitability and competence of a person to act as decision-maker for a person with impaired decision-making capacity, the tribunal must have regard to the nature and circumstances of any criminal conviction of the person, including the likelihood that the commission of the offence may adversely affect the person with impaired decision-making capacity;
- . a proposed decision-maker must advise the tribunal, in confidence, on oath or affirmation whether he or she has any criminal conviction;
- . the Commissioner of the Police Service or a person delegated by the Commissioner for the purpose, upon request made by the tribunal, shall disclose to the tribunal the criminal history and convictions such as are contained in the Commissioner's records of a proposed decision-maker.

The Commission recommends that the legislation provide that:

- . in considering the suitability and competence of a person to act as a decision-maker for a person with impaired decision-making capacity the tribunal must, if the appointment is for a financial decision, have regard to:
 - . the nature and circumstances of any bankruptcy of the proposed decision-maker;
 - . the nature and circumstances of any insolvency of any company of which the person was, or is, a director, secretary or other principal officer; and
- . a proposed decision-maker must advise the tribunal on oath or affirmation, if the proposed appointment is for a financial decision, whether he or she:
 - . is, or has been, bankrupt; or
 - . is, or has been, a director, secretary or other principal officer of a company that is, or has been, insolvent.

The Commission recommends that the legislation provide that:

- . in considering the suitability and competence of a person to act as decision-maker for a person with impaired decision-making capacity, the tribunal must have regard to the nature and circumstances of any refusal of or

removal from appointment whether in Queensland or elsewhere; and

- . a proposed decision-maker must advise the tribunal on oath or affirmation whether he or she has been refused or removed from appointment as decision-maker, whether in Queensland or elsewhere.

The Commission recommends that the legislation provide that:

- . a paid carer not be eligible for appointment as decision-maker for a person with impaired decision-making capacity; and
- . the Adult Guardian have power to delegate day-to-day decision-making to a paid carer in appropriate circumstances.

Assisted decision-making orders

The Commission recommends that the legislation provide that the tribunal may appoint an assistant decision-maker to assist a person with a decision-making disability to make the person's own decision.

Tribunal recommendations

The Commission recommends that the legislation provide that:

- . if an application has been made to the tribunal, the tribunal may make recommendations it considers appropriate about action that should be taken by a participant;
- . if the tribunal makes a recommendation it may -
 - (a) continue with the application;
 - (b) adjourn the application;
 - (c) dismiss the application;
 - (d) reserve leave for a participant to apply to the tribunal for directions about implementing the recommendation.

Decision-making orders

The Commission recommends that the legislation provide that the tribunal may appoint an appointed decision-maker for a decision for a person on terms considered appropriate by the tribunal.

Appointment of more than one decision-maker

The Commission recommends that the legislation provide that the tribunal may appoint different decision-makers for different decisions or types of decision, or joint or joint and several decision-makers for a decision or type of decision.

Appointment of alternative decision-makers

The Commission recommends that the legislation provide that:

- . the tribunal may appoint -
 - . alternative appointees so power is given to a particular appointee only in stated circumstances; or
 - . successive appointees so power is given to a particular appointee only when the power of a previous appointee ends; and
- . if an alternative appointee takes over as decision-maker for a period in excess of six weeks, the alternative decision-maker must notify the tribunal that he or she is acting in place of the original decision-maker; and
- . if a successive appointee takes over as decision-maker because the authority of a previous decision-maker has ended, the successive decision-maker must notify the tribunal that he or she has become decision-maker.

Ratifying acts of informal decision-makers

The Commission recommends that the legislation provide that:

- . an informal decision-maker may apply to the tribunal for approval or ratification of a decision proposed to be made or made by the informal decision-maker for a person with impaired decision-making capacity;
- . the tribunal may approve or ratify the decision if it considers that the informal decision-maker proposes to act or has acted honestly and with a degree of care that would be reasonable for a person of the decision-maker's expertise and experience;
- . if the tribunal approves or ratifies the decision, the informal decision-maker is protected from any personal liability that he or she would otherwise incur or have incurred to either the person with impaired decision-making capacity or a third party as a result of making or having made the decision.

Review of appointment

The Commission recommends that the legislation provide that the tribunal may conduct a review in the way it considers appropriate.

The Commission recommends that the legislation provide that:

- . the tribunal must periodically review an appointment;
- . the tribunal may, on making an appointment, order that -
 - . if the tribunal considers that the need for an appointment will continue for more than two years and the need for the tribunal to review the appointment will be very limited, the appointment be reviewed within a period of three years; or
 - . if the tribunal considers it appropriate, the appointment be reviewed in less than two years;
- . the tribunal may review an appointment at any time on its own initiative or on the application of the person for whom the order was made or of an interested person;
- . the first review of an appointment must take place within two years after the appointment is made or within the time specified by the tribunal at the time the appointment is made;
- . at the end of a review of an appointment, the tribunal must revoke the appointment unless it is satisfied that it would make another appointment if a new application for an appointment were to be made;
- . if the tribunal is satisfied that there are appropriate grounds for an appointment to continue, it may -
 - . continue the order making the appointment; or
 - . change the order making the appointment;
- . after the first review, an appointment must be reviewed within three years of the most recent review.

Where decision-maker chosen under an enduring power of attorney

The Commission recommends that the legislation provide that if a person makes an enduring power of attorney and the tribunal subsequently, without reference to the enduring power of attorney, appoints a decision-maker with the same power as

a decision-maker chosen under the enduring power of attorney, the appointed decision-maker and a person who, without knowledge of the enduring power of attorney, deals with the appointed decision-maker should be protected.

CHAPTER 8: THE TRIBUNAL

The Commission recommends that legislation provide that:

- . an independent tribunal be established;
- . the functions of the tribunal include -
 - . considering applications for appointment of decision-makers;
 - . appointing decision-makers where necessary;
 - . performing certain functions in relation to enduring powers of attorney;
 - . making orders about the functions of, and giving directions to, appointed decision-makers;
 - . making declarations about a person's decision-making capacity;
 - . making certain special consent health care decisions.

Membership of the tribunal

The Commission recommends that the legislation provide that members of the tribunal may be appointed as full-time or part-time members.

Eligibility for membership

The Commission recommends that the legislation provide for the following categories of membership of the tribunal:

- . people with legal qualifications, combined with training or experience which makes the person suitable for appointment to the tribunal;
- . people with qualifications and expertise in health care or other professions which involve special knowledge in various areas of mental and intellectual disability; and

- . people with personal experience of, or in working with or caring for, a person with a mental or intellectual disability.

The Commission recommends that the legislation provide that the membership of the tribunal should reflect to the greatest extent possible the social and cultural diversity of the general community.

Appointment of members

The Commission recommends that the legislation provide that:

- . the President, Deputy President and members of the tribunal be appointed by the Governor in Council;
- . for selecting a person for recommendation for appointment as President, Deputy President or member, the Minister must advertise for applications from suitably qualified persons to be considered for selection.

The Commission recommends that:

- . before making a recommendation to the Governor in Council about the appointment of the President and the Deputy President the Minister should consult with key organisations;
- . recommendations about the appointment of members should be based on the advice of a selection committee chaired by the President of the tribunal.

Duration of appointment

The Commission recommends that the legislation provide that:

- . the President and Deputy President be appointed for a period of not longer than five years;
- . members of the tribunal be appointed for a period of not longer than three years;
- . the office of President, Deputy President or member becomes vacant if the holder of the office resigns by signed notice of resignation;
- . the Governor in Council have power to terminate the appointment of the President, Deputy President or a member because of:

(xxix)

- . physical or mental incapacity to carry out official duties satisfactorily;
 - . neglect of duty;
 - . dishonourable conduct;
 - . conviction of an offence that makes the person unsuitable to carry out official duties;
- . if a person ceases to be President or Deputy President, the person ceases to be a member of the tribunal.

Constitution of panels

The Commission recommends that the legislation provide that hearings of the tribunal be conducted by three member panels constituted by one member from each of three recommended categories of membership.

Presiding member

The Commission recommends that the legislation provide that, at a hearing of the tribunal, the President, Deputy President or member of the panel with legal qualifications should preside.

Disqualification from hearing

The Commission recommends that the legislation provide that, if a member of the tribunal has a personal or financial interest in a matter before the tribunal and the interest could conflict with the proper performance of the member's duties on the matter:

- . the member must give written notice of the nature of the interest to the President as soon as practicable;
- . if the President has a relevant interest, the President must give written notice of the nature of the interest to the Deputy President;
- . the member giving notice must not be present when the tribunal considers the matter or take part in a tribunal decision about the matter, unless the person to whom notice is given decides the interest is not of a material nature.

Observance of principle

The Commission recommends that the legislation impose on members of the tribunal an obligation to observe the principles set out in the legislation.

Notification of hearing of an application

The Commission recommends that the legislation provide that the tribunal must give notice of the hearing of an application to the person who is the subject of the application and, as far as practicable, to the following:

- . the applicant;
- . the members of the person's family;
- . any primary carer of the person other than a family member;
- . all current assistant and substitute decision-makers for the person;
- . if the application concerns a personal or health care decision, the Adult Guardian;
- . if the application concerns a financial decision or decision about a legal matter, the Public Trustee;
- . anyone else the tribunal considers should be notified.

Dispensing with notification

The Commission recommends that the legislation provide that:

- . the tribunal have power to dispense with the requirement of notice to all or any of the people specified above other than the person who is the subject of the application;
- . notice to the person who is the subject of the application must be given in the way the tribunal considers most appropriate having regard to the person's needs.

Effect of failure to give notice

The Commission recommends that the legislation provide that:

- . failure to comply with the requirement to give notice to all or any of the people listed above, other than the subject of the application, does not affect the validity of a hearing or the tribunal's decision about an application;
- . failure to notify the person who is the subject of the application invalidates the hearing;
- . a person who acts in reliance on a tribunal order which is invalid because of failure to notify the person who is the subject of the application should be protected to the extent that he or she did not know or have reason to believe that the subject of the application had not been notified.

Informality

The Commission recommends that the legislation provide that:

- . a proceeding before the tribunal must be conducted as simply and quickly as the legislative requirements and an appropriate consideration of the matters before the tribunal allow;
- . the tribunal is not bound by the rules of evidence and may inform itself on a matter in any way it considers appropriate.

Procedural fairness

The Commission recommends that the legislation provide that the tribunal must observe the rules of procedural fairness.

Nature of hearing

The Commission recommends that the legislation provide that:

- . a hearing by the tribunal of a proceeding must be open;
- . if the tribunal is satisfied that it is desirable to do so, the tribunal may exclude a person from an open hearing;
- . if the tribunal is satisfied that it is desirable to do so because of the confidential nature of any information or for any other reason, the tribunal may -

- (a) direct that a hearing or part of a hearing take place in private and give directions about who may be present;
 - (b) give directions prohibiting or restricting the disclosure to some or all of the participants in a proceeding of information given before the tribunal;
- . a person must not publish information about a proceeding unless the tribunal, by order, permits such publication;
 - . if the tribunal is satisfied that publication of oral or documentary evidence given at a proceeding of the tribunal is in the public interest, the tribunal may, by order, permit publication of that information;
 - . if the tribunal is satisfied that disclosure of the identity of a person involved in a proceeding is in the public interest, the tribunal may, by order, permit the disclosure of the person's identity.

Joining parties

The Commission recommends that the legislation provide that the tribunal may join a person as a party to a proceeding before the tribunal.

Assistance for the tribunal

The Commission recommends that the legislation provide that the tribunal may appoint a person with appropriate knowledge or expertise, including appropriate communication skills, to assist the tribunal in a proceeding before it.

Attendance of person at hearing

The Commission recommends that the legislation provide that the tribunal may:

- . require the person who is the subject of the proceeding to be brought before the tribunal;
- . require the person who is the subject of the proceeding to undergo a medical or other examination;
- . conduct a proceeding or part of a proceeding at any place in Queensland.

Obtaining information

The Commission recommends that the legislation provide that where the tribunal requires a witness to appear in person to give evidence to the tribunal, the tribunal may make an order as to fees and expenses to be paid to the witness.

The Commission recommends that the legislation provide that if a person gives to the tribunal information that might tend to incriminate the person, the information is not admissible in evidence against the person in a civil or criminal proceeding except in a proceeding -

- . for certain offences relating to giving false information to the tribunal;
- . brought by or for the person against the person's employer;
- . about the person's professional registration, or about the person's approval, registration or licensing as proprietor or operator of an institution or facility involved in the care of people with an impaired decision-making capacity.

Representation

The Commission recommends that the legislation provide that:

- . a participant in a proceeding before the tribunal:
 - . may appear in person;
 - . may, with the tribunal's leave, be represented by a lawyer or agent;
- . if, in a proceeding about a person:
 - . the person is not represented in the proceeding; or
 - . the person is represented in the proceeding by a representative whom the tribunal considers to be unsuitable to represent the person

the tribunal may appoint a representative to represent the person's views, wishes and interests.

Notification of decision

The Commission recommends that the legislation provide that the tribunal must, within a reasonable time after an application is heard, give a copy of its decision on an application about a matter to:

(xxxiv)

- . the person who is the subject of the application; and
- . each participant in the proceeding; and
- . each person given notice of the hearing of the application.

Notification of reasons for decision

The Commission recommends that the legislation provide that the tribunal must, within twenty-eight days after giving its decision, prepare a written statement of reasons which refers to the evidence and includes findings on material questions of fact.

The Commission recommends that the legislation provide that:

- . the tribunal must give a copy of its reasons for its decision on an application about a matter to -
 - . the person who is the subject of the application; and
 - . each participant in the proceeding;
- . the tribunal may also give a copy of its reasons to any other person to whom the tribunal considers appropriate.

Deferred orders

The Commission recommends that the legislation provide that:

- . the tribunal may make an advance appointment of a decision-maker for a person who is at least seventeen and a half years old but not yet eighteen;
- . in making such an order the tribunal must consider whether there is a reasonable likelihood that, when the person turns eighteen, the person will have impaired decision-making capacity;
- . the appointment begins when the person turns eighteen;
- . the appointment ends when the person turns nineteen unless the tribunal orders that the appointment is for a longer period;
- . the tribunal may, if it considers that the need for the appointment will continue for a period longer than one year with limited need for review, order the appointment for a period of up to three years, after which time the appointment must be reviewed.

Emergency orders

The Commission recommends that the legislation provide that:

- . if the tribunal is satisfied that urgent action is required, it may make an interim order in a proceeding without hearing and deciding the proceeding or otherwise complying with the usual procedural requirements;
- . an interim order may be renewed;
- . an interim order has effect for the period, not exceeding ten days, stated in the order.

Entry and removal

The Commission recommends that the legislation provide that where the tribunal is satisfied that a person's decision-making capacity is impaired and that there is an immediate danger to the person's welfare:

- . the tribunal should have power to order entry to the premises and, if necessary, removal of the person to a place of safety;
- . the Adult Guardian or any person with a genuine interest in the person's welfare should be able to bring an application for such an order;
- . the application should be able to be brought whether or not a decision-maker has been appointed to make decisions about the person's welfare;
- . the tribunal should have power, if it is satisfied that there is sufficient evidence to justify the making of an order, to authorise the Adult Guardian with the assistance of members of the Police Service if necessary, and using such force as is reasonable, to enter the premises and remove the person;
- . the order should specify -
 - (a) the purpose for which it is issued;
 - (b) the person whose removal it authorises;
 - (c) the place from which removal is authorised;
 - (d) particular hours during which removal is authorised at any time of day or night; and
 - (e) the date on which it ceases to have effect, being a date no later than seven days after the issue of the order;
- . it should be an offence to hinder or obstruct the Adult Guardian or a member of the Police Service acting under the authority of an order;

- . after a person has been removed to a place of safety, the Adult Guardian should apply to the tribunal as soon as possible to determine whether a decision-maker should be appointed or, if a decision-maker has already been appointed, whether that appointment should continue;
- . if the tribunal is satisfied that there is a need to appoint a decision-maker and if there is no appropriate decision-maker available, the tribunal should appoint the Adult Guardian to make decisions about the person's welfare.

Non-disclosure of confidential information

The Commission recommends that the legislation provide that:

- . a person who gains information through involvement in the administration of the legislation must not make a record of or disclose the information unless:
 - . the consent of the person has been obtained;
 - . disclosure is required in carrying out the functions of the tribunal;
 - . disclosure is required by law or is otherwise excused by law;
 - . disclosure involves statistical or other information that could not reasonably be expected to lead to the identification of the person to whom it relates; or
 - . in the opinion of the tribunal, the duty of non-disclosure is overridden by a public interest factor involving the personal safety of a member of the public.

Reporting requirements

The Commission recommends that the legislation provide that:

- . as soon as practicable after each financial year, the tribunal must:
 - . prepare a report of its operations during the year; and
 - . give a copy of the report to the Minister;
- . the Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after the Minister receives the report.

Appointment of staff

The Commission recommends that the legislation provide that:

- . the registrar of the tribunal, and other staff necessary to enable the tribunal to exercise its functions, are to be appointed under the *Public Service Management and Employment Act 1988*;
- . the President of the tribunal has all the functions and powers of the chief executive of a department, so far as the functions and powers relate to the organisational unit made up of the registrar and staff, as if -
 - (a) the unit were a department within the meaning of the *Public Service Management and Employment Act 1988*; and
 - (b) the President were the chief executive of the department.

CHAPTER 9: DUTIES AND POWERS OF DECISION-MAKERS

General functions and powers

The Commission recommends that the legislation provide that a decision-maker must comply with the principles set out in the legislation.

The Commission recommends that the legislation provide that a decision-maker who may make a decision for a person with impaired decision-making capacity must exercise the power honestly and with the degree of care that is reasonable for a person having the decision-maker's experience and expertise.

The Commission recommends that the legislation provide that a decision-maker who may make a decision for a person with impaired decision-making capacity must, when exercising the power, exercise it as required by the terms of the power.

The Commission recommends that the legislation provide that:

- . a decision-maker may apply to the tribunal for advice or directions about the exercise of a power or the interpretation of its terms;
- . a decision-maker who acts on the tribunal's advice or directions is to be taken to have complied with the legislation unless the decision-maker knowingly gave the tribunal false or misleading information relevant to the tribunal's advice or directions;

- . if the tribunal gives directions to a decision-maker the decision-maker must not contravene them unless the decision-maker has a reasonable excuse.

The Commission recommends that the legislation provide that:

- . a decision-maker who may make a decision for a person whose decision-making capacity is impaired must consult on a regular basis with another decision-maker who may make a decision for the person to ensure that the person's interests are not prejudiced by a breakdown in communication between different decision-makers; and
- . if decision-makers for different kinds of decisions are unable to agree, one or more of the decision-makers may apply to the tribunal for directions.

The Commission recommends that the legislation provide that:

- . decision-makers who may make a decision jointly must exercise the power unanimously; and
- . if it is impracticable or impossible to exercise the power unanimously, one or more of the joint decision-makers may apply to the tribunal for directions.

The Commission recommends that the legislation provide that:

- . a decision-maker may, with the tribunal's leave, withdraw as decision-maker for a decision or type of decision the decision-maker has been given power to make;
- . if the tribunal gives leave for a decision-maker to withdraw, the tribunal may appoint a replacement decision-maker;
- . if a person who has given a chosen decision-maker power to make a decision has decision-making capacity for the decision, the chosen decision-maker may withdraw by giving written notice to the person.

Functions and powers for financial decisions

The Commission recommends that the legislation provide that a decision-maker who is authorised to make financial decisions must, if ordered by the tribunal, present a plan of management to the tribunal or its nominee for approval.

The Commission recommends that the legislation provide that:

(xxxix)

- . a decision-maker who may make a financial decision for a person with impaired decision-making capacity for the decision must keep such records as are reasonable in the circumstances;
- . the tribunal have power to require a decision-maker to:
 - . produce reasonable records of dealings and transactions involving the person's property;
 - . keep such records as the tribunal considers appropriate;
 - . produce those records for inspection at a time and in a manner as determined by the tribunal.

The Commission recommends that the legislation provide that a decision-maker who may make a financial decision must keep the decision-maker's property separate from the property of the person whose decision-making capacity is impaired, unless the property is owned jointly by the person and the decision-maker.

The Commission recommends that the legislation provide that:

- . a decision-maker who may make a financial decision for a person with impaired decision-making capacity must not enter into a conflict transaction.
- . a "conflict transaction" is a transaction in which there is or could be conflict between:
 - . the duty of the decision-maker towards the person with impaired decision-making capacity and the interests of the decision-maker or a relation, business associate or close friend of the decision-maker in connection with the transaction; or
 - . the duty of the decision-maker towards the person with impaired decision-making capacity and any duty to some other person which the transaction would impose on the decision-maker in relation to the transaction;
- . a decision-maker may enter into a specific conflict transaction or a class of conflict transactions or a series of related conflict transactions if:
 - . the decision-maker obtains the tribunal's consent; or
 - . for a chosen decision-maker empowered by an enduring power of attorney - the enduring power of attorney includes the adult's consent to the transaction or to the class or series of transactions;

(xl)

- . the fact that a person is related to the person with impaired decision-making capacity does not, in itself, mean that their interests could conflict;
- . the fact that a person may be a beneficiary of the estate of the person with impaired decision-making capacity does not, in itself, mean that their interests could conflict.

The Commission recommends that the legislation provide that a decision-maker who may make a financial decision for a person whose decision-making capacity is impaired may give away the person's property only if:

- . the gift is to a relation or close friend of the person whom the person might reasonably have been expected to benefit and is of a seasonal nature or because of a special event (including, for example, a birth or marriage); or
- . the gift is in the nature of a donation that the person had previously made or might reasonably be expected to make;

and the gift's value is not more than what is reasonable having regard to all the circumstances and, in particular, the person's financial circumstances.

The Commission recommends that the legislation provide that a financial decision-maker must maintain any person whom the person with impaired decision-making capacity would have had a legal duty to maintain if his or her decision-making capacity had not been impaired.

Additional duties for financial decisions

The Commission recommends that the legislation provide that, if a decision-maker has power to make a financial decision for a person whose decision-making capacity is impaired, the person or another interested person may apply to the tribunal for an order that the decision-maker provide to the person, in a manner appropriate to the person's needs, information about the person's financial status.

The Commission recommends that the legislation provide that any dealing with land purporting to take effect under the exercise of an enduring power of attorney or of an order of the tribunal shall have no force or validity until the instrument creating the power or the tribunal order is registered, but upon registration any such disposition shall take effect as if the instrument creating the power or the tribunal order had been registered before the instrument purporting to give effect to such dealing.

Consequences of breach of duty

The Commission recommends that the legislation provide that the tribunal have power to remove power from or to replace a decision-maker for a person if:

- . a relevant interest of the person has not been, or is not being, adequately protected; or
- . the decision-maker is no longer suitable or competent to act as substitute decision-maker; or
- . the decision-maker has neglected the decision-maker's duties or abused the decision-maker's powers; or
- . the decision-maker has otherwise contravened the provisions of the legislation.

The Commission recommends that the legislation provide that:

- . a decision-maker who may make a decision for a person with impaired decision-making capacity may be required by the tribunal to compensate the person (or, if the person has died, the person's estate) for a loss caused by the decision-maker's failure to comply with the obligations imposed by the legislation;
- . an application for compensation may be brought within six months, or such longer period as the tribunal allows, of the death of the person or of the decision-maker;
- . compensation paid under a tribunal order must be taken into account in assessing damages in any later civil proceeding in relation to the decision-maker's exercise of the power.

The Commission recommends that the legislation provide that if a decision-maker is prosecuted in a court for a failure to comply with the statutory obligations, the court may, if it considers fair, completely or partly excuse the failure.

CHAPTER 10: HEALTH CARE DECISIONS

Decision-maker chosen by enduring power of attorney for health care

The Commission recommends that the legislation provide that a person who makes an enduring power of attorney may include in the decisions authorised by the enduring power of attorney decisions about the person's future health care.

The Commission recommends that the legislation provide that:

- . the authority of a chosen decision-maker under an enduring power of attorney for health care should not come into operation unless the person who made the power has lost capacity to make the decision in question;
- . where doubt exists as to whether or not a person who made an enduring power of attorney for health care has capacity to make decisions about his or her own treatment, the matter should be referred to the tribunal to determine whether the enduring power of attorney is in operation.

The Commission recommends that the legislation provide that:

- . a revocation of an enduring power of attorney for health care must:
 - . be in writing;
 - . be signed by the person revoking it or, if the person instructs, for the person and in the person's presence, by another person who is at least 18 and who is not the witness or a chosen decision-maker for the person;
 - . be signed and dated by a witness who is -
 - . not a chosen decision-maker for the person;
 - . not a relation of the person or a chosen decision-maker; and
 - . not a current health care provider for the person.
- . a revocation of an enduring power of attorney for health care may include, as evidence of the revocation, a statement by the witness that:
 - . the person revoking the power appeared to the witness to have the necessary degree of capacity;
 - . the person revoking the power signed the revocation in the presence of the witness; or
 - . if the revocation is signed by another person -
 - . the person revoking the power instructed, in the presence of the witness, the other person to sign; and
 - . the other person signed the revocation in the presence of both the person revoking the power and the witness.

Statutorily authorised health care decision-makers

The Commission recommends that the legislation provide that:

- . the following people are statutorily authorised decision-makers for a person with impaired decision-making capacity for a health care decision:
 - . the person's spouse;
 - . each of the person's adult children;
 - . each of the person's parents;
 - . if a person does not have a spouse, adult child or parent reasonably available and willing to act, but the person does have a brother or sister who is over the age of eighteen, each of the person's adult brothers and sisters;
 - . a close friend of the person;
- . a statutorily authorised decision-maker be able to make health care decisions, other than special consent health care decisions, for a person with impaired decision-making capacity;
- . to the extent that a health care provider complies with a health care decision made by a person who represented to the health care provider that the person had the right to make the decision, the health care provider is taken to have the consent of the person with impaired decision-making capacity, unless the health care provider knew, or could reasonably have been expected to have known, that the person did not have the right to make the decision.

Where there is no statutorily authorised health care decision-maker

The Commission recommends that the legislation provide that:

- . where there is no statutorily authorised decision-maker, it is lawful for a health care provider to carry out health care treatment, other than special consent treatment, without consent if -
 - . in the opinion of the health care provider -
 - . the treatment is necessary; and
 - . the treatment is the form of treatment that will most successfully promote the patient's health and well-being;

(xliv)

- . the treatment is not controversial;
- . there is no dispute among interested parties about the giving of the treatment or about the capacity of the person to make his or her own decision about the treatment;
- . the patient does not object to the treatment;
- . a treatment provider must certify in the person's clinical records that such treatment given without consent is the form of treatment that will most successfully promote the patient's health and well-being and that the patient does not object to the carrying out of the treatment;
- . the regulations may specify treatment that may not be given without a valid consent.

Decision-maker appointed by the tribunal

The Commission recommends that the legislation provide that:

- . if a person has impaired decision-making capacity for a health care decision, the tribunal may appoint a decision-maker for the decision if there is no statutorily authorised health care decision-maker or the tribunal considers it impracticable or inappropriate for a statutorily authorised health care decision-maker to make the decision;
- . the authority of a decision-maker appointed by the tribunal takes precedence over a statutorily authorised decision-maker's power to make health care decisions.

Legal effect of an advance directive

The Commission recommends that the legislation provide that:

- . a person who has the necessary degree of capacity may make an advance directive including decisions about the person's future health care;
- . if the person loses capacity for a decision included in the directive, the directive is as effective as if the person had made the decision when it needed to be made and had the capacity to make the decision at that time.

Choosing a decision-maker in an advance directive

The Commission recommends that:

- . the maker of an advance directive be able to appoint another person or persons to make health care decisions on his or her behalf if the instructions in the directive are inadequate or unclear;
- . a person so appointed would be under the same duties and obligations as if he or she had been appointed a chosen decision-maker under an enduring power of attorney; and
- . a person who is not eligible to be a chosen decision-maker under an enduring power of attorney for health care should not be eligible for appointment under an advance directive.

Requirements for making and revoking an advance directive

The Commission recommends that the legislation provide that the same requirements should apply to the making and revocation of an advance directive for health care as apply to the making and revocation of an enduring power of attorney which gives authority to make health care decisions.

Use of a prescribed form

The Commission recommends that the legislation does not include a prescribed form of advance directive, but that relevant consumer and professional organisations co-operate in the development of a form or forms appropriate for use as guides.

Certificate from medical practitioner

The Commission recommends that the legislation should not include a requirement that an advance directive must include a certificate from a medical practitioner to the effect that the person making the directive has discussed the contents of the directive with the medical practitioner.

Preservation of common law rights

The Commission recommends that the legislation provide that common law recognition of instructions about health care that are not given in an advance directive made under the legislation is not affected by the legislation.

Criteria for making health care decisions

The Commission recommends that the legislation:

- . acknowledge the need to strike a balance between -
 - . ensuring that a person with impaired decision-making capacity is not deprived of necessary health care merely because the person lacks capacity to consent; and
 - . ensuring that health care given to the person is only for the purpose of promoting and maintaining the person's health and well-being;
- . provide that a health care decision should be made for a person with impaired decision-making capacity for the decision only if the decision is appropriate to promote and maintain the person's health and well-being.

The Commission recommends that the legislation provide that:

- . the treatment provider be required to give the decision-maker the following information:
 - . the nature of the patient's condition;
 - . the alternative forms of health care available, or likely to be available in the foreseeable future for the condition;
 - . the general nature and effect of each form of health care;
 - . the nature and the degree of any significant risks associated with each form of health care;
 - . the reasons why it is proposed that a particular form of health care should be carried out;
- . in deciding whether a decision is appropriate to promote and maintain the patient's health and well-being, the decision-maker must take into account the above information.

The Commission recommends that the legislation provide that where a patient's objection to treatment is overridden by the consent of an authorised decision-maker, the use of the minimum amount of force necessary for the administration of the proposed treatment should be allowed.

Urgently needed treatment

The Commission recommends that the legislation provide that, if a person has impaired decision-making capacity for a decision, health care other than special consent health care may be carried out without consent if:

- . it is not reasonably practicable to obtain consent; and
- . a health care provider considers that the health care should be urgently carried out -
 - . to meet imminent risk to the person's life or health; or
 - . to prevent or relieve significant pain or distress to the person.

Special consent procedures

The Commission recommends that the legislation should provide that:

- . the tribunal may consent, for a person with impaired decision-making capacity for the decision, to removal of tissue from the person for donation to another person only if the tribunal is satisfied that -
 - . the risk to the donor is small;
 - . the risk of the failure of the donated tissue is low;
 - . the life of the proposed recipient would be in danger without the donation;
 - . no other compatible donor is reasonably available;
 - . there is, or has been, a close personal relationship between the proposed donor and the proposed recipient;
- . the tribunal may not consent if the proposed donor objects;
- . the proposed donor's objection is effective whether or not the proposed donor has capacity to understand what the procedure involves;
- . if the tribunal consents to the removal of tissue for donation, the tribunal's order must specify the proposed recipient.

The Commission recommends that the legislation provide that:

(xlviii)

- . it is not necessary to obtain the consent of the tribunal for the performance of a procedure the primary purpose of which is to treat organic malfunction or disease which is likely to cause serious or irreversible damage to the person's physical health if it is not treated;

and that, before consenting to a sterilisation procedure the primary purpose of which is not to treat organic malfunction or disease, the tribunal must be satisfied that:

- . the person concerned is, or is likely to be, fertile and sexually active, and there is no method of contraception that could, in all the circumstances, reasonably be expected to be successfully applied; or
- . if the person on whom it is proposed to perform the procedure is female, cessation of menstruation by sterilisation is the only practicable way of overcoming demonstrated problems associated with menstruation;

and that:

- . the person concerned is not likely, in the foreseeable future, to develop the capacity to decide; and
- . the procedure cannot reasonably be postponed; and
- . the procedure is not being performed to remove the risk of pregnancy resulting from sexual abuse or for eugenic reasons;

and that the tribunal be required to take into account:

- . alternative forms of treatment which are presently available, or likely to become available in the foreseeable future; and
- . the nature and extent of any significant long or short term risks associated with the proposed procedure and with any available alternative forms of treatment, including other sterilisation procedures.

The Commission recommends that the legislation provide that if the tribunal consents to sterilisation, the sterilisation is not unlawful.

The Commission recommends that the legislation provide that:

- . the consent of the tribunal is not necessary for the performance of a procedure which is medically necessary and which results in termination of a person's pregnancy;
- . the tribunal may consent, for a person with impaired decision-making capacity for the decision, to termination of the person's pregnancy;

(xlix)

- . the tribunal may consent only if it is satisfied that the termination is necessary to preserve the person from serious danger to her life or physical or mental health;
- . if the tribunal consents to a termination, the termination is not unlawful.

The Commission recommends that the legislation provide that:

- . the tribunal may consent, for a person with impaired decision-making capacity for the decision, to the person's participation in research or experimental health care to diagnose and treat the person;
- . the tribunal may not consent unless it is satisfied that:
 - . the research or health care is approved by an appropriate ethics committee;
 - . the research or health care relates to a condition which the person has;
 - . the research or health care may result in significant benefit to the person;
 - . any risk or inconvenience to the person and the person's quality of life is outweighed by the potential benefit;
 - . the potential benefit cannot be achieved in any other way;
- . the tribunal may not consent if the person objects to the research or health care.

The Commission recommends that the legislation provide that:

- . the tribunal may consent, for a person with impaired decision-making capacity for the decision, to the person's participation in research or experimental health care treatment intended to gain knowledge that can be used in the diagnosis or treatment of a condition affecting the person;
- . the tribunal may not consent unless it is satisfied that:
 - . the research or health care is approved by an appropriate ethics committee;
 - . the risk and inconvenience to the person and to the person's quality of life is small;

(l)

- . the research or health care relates to a condition the person has or has had;
 - . the research or health care may result in significant benefit to the person or other persons with the condition;
 - . the research or health care cannot be carried out without a person with or who has had the condition taking part;
 - . the research or health care will not unduly interfere with the person's privacy.
- . the tribunal may not consent if the person objects to the research or health care.

The Commission recommends that the legislation provide that:

- . if, on an application for the tribunal's consent to special consent health care for a person with impaired decision-making capacity for the decision, the tribunal considers that there will be a need for the treatment to continue or for further special consent health care of a similar nature:
 - . the tribunal may appoint a decision-maker to consent to the continuation or the carrying out of the health care;
 - . the tribunal may at any time impose conditions or give directions as to the exercise of the decision-maker's authority;
 - . the tribunal may at any time revoke the decision-maker's authority;

and that:

- . the decision-maker, in considering a request for consent to continuing or further similar health care, must have regard to the views, if any, of the person, and to the legislative principles.

The Commission recommends that the legislation provide that the tribunal may consent, for a person with impaired decision-making capacity for the decision, to the person having health care prescribed under the regulations only if the tribunal is satisfied of the matters prescribed under the regulations.

(li)

CHAPTER 11: APPEALS

Who should hear the appeal

The Commission recommends that the legislation provide that an appeal from a determination of the tribunal should lie to a judge of the Supreme Court of Queensland.

Grounds for appeal

The Commission recommends that the legislation provide that:

- . appeal be as of right on a question of law;
- . the leave of the Supreme Court be required for an appeal on any other question.

The appeal process

The Commission recommends that the legislation provide that the appeal body may decide an appeal on -

- . the material before the tribunal; and
- . further evidence (if any) the body considers appropriate to receive.

Who should have the right to appeal

The Commission recommends that the legislation provide that, in relation to an appeal against a tribunal decision, a person eligible to appeal is:

- (a) the person whose decision-making needs are under consideration;
- (b) the person who made the application;
- (c) a proposed appointee;
- (d) a decision-maker removed by the tribunal;
- (e) the Adult Guardian;
- (f) the Public Trustee;

(iii)

- (g) the Attorney-General;
- (h) a person given leave to appeal by the Supreme Court.

Powers of the appeal body

The Commission recommends that the legislation provide that in deciding an appeal against a tribunal order, direction or decision, a judge of the Supreme Court may:

- . confirm or change the order, direction or decision;
- . set aside the order, direction or decision and, if the Court considers it appropriate:
 - . substitute its own order, direction or decision (being one the tribunal could have made); or
 - . remit the subject matter of the appeal to the tribunal for further consideration or for reconsideration in accordance with directions or recommendations of the Court.

Costs of an appeal

The Commission recommends that the legislation provide that:

- . each party to an appeal is to bear the party's own costs of the appeal;
- . a judge of the Supreme Court may order a party to an appeal to pay costs to another person if the court considers:
 - (a) the appeal was frivolous or vexatious;
 - (b) the party has not been given reasonable prior notice of intention to apply for an adjournment;
 - (c) the party has incurred costs because the appellant defaulted in the procedural requirements.

The Commission recommends that adequate provision should be made for appeals to be funded in appropriate cases through the Legal Aid Office.

(liii)

CHAPTER 12: THE ADULT GUARDIAN AND THE PUBLIC ADVOCATE

The Commission recommends that the legislation provide that:

- . two separate independent statutory offices be established to perform functions under the legislation;
- . the Public Advocate:
 - . have responsibility for systemic advocacy on behalf of people with a decision-making disability;
 - . may take part in proceedings about the protection of the rights and interests of people with a decision-making disability;
 - . have responsibility for promoting public awareness about the rights and interests of people with a decision-making disability;
- . the Adult Guardian have responsibility for:
 - . a scheme of community decision-makers;
 - . a scheme of community visitors;
 - . investigating complaints that a person with a decision-making disability is being abused or neglected or is in need of assistance;
 - . seeking assistance for a person with a decision-making disability from a government department, institution, welfare organisation or the provider of a service or facility;
 - . providing information and advice about the legislative scheme proposed by the Commission and about the role of decision-makers under that scheme.

The Commission recommends that the demand for individual advocacy should be met by further development of government policy and funding commitment towards independent community based advocacy, rather than through the additional funding that would be required to have this role carried out through the Public Advocate.

The Commission recommends that the roles and functions of the Office of the Adult Guardian and the Office of the Public Advocate should be independent of the Office of the Public Trustee.

(liv)

The Commission recommends that the legislation provide that the Adult Guardian, if appointed decision-maker for a person whose decision-making capacity is impaired, may delegate day to day decision-making authority to another person.

The Commission recommends that the legislation provide that:

- . as soon as practicable after each financial year, the Adult Guardian and the Public Advocate must:
 - . prepare a report of operations during the year; and
 - . give a copy of the report to the Minister for Justice and the Attorney-General;
- . the Minister must table a copy of the report in the Legislative Assembly within 14 sitting days after the Minister receives the report;
- . the staff necessary to enable the Adult Guardian and the Public Advocate to exercise their functions are to be appointed under the *Public Service Management and Employment Act 1988*;
- . the Adult Guardian and the Public Advocate have all the functions and powers of the chief executive of a department, so far as the powers and functions relate to the organisation units made up of the Adult Guardian and staff and the Public Advocate and staff, as if -
 - (a) those units were departments within the meaning of the *Public Service Management and Employment Act 1988*; and
 - (b) the Adult Guardian and the Public Advocate were the chief executives of those departments.

CHAPTER 13: OTHER MATTERS

Costs

The Commission recommends that the legislation provide that:

- . no fees are payable to the tribunal for making an application under the legislation;
- . each participant in a proceeding is to bear the participant's own costs of the proceeding;

(iv)

the tribunal may order an applicant to pay a participant's costs in exceptional circumstances, including, for example, if the tribunal considers the application is frivolous or vexatious.

Interjurisdictional recognition of orders

The Commission recommends that the legislation provide for recognition and enforcement of orders made in other Australian jurisdictions.

Coronial inquests

The Commission reaffirms its view that the issues raised by respondents to the Draft Report are important and should be dealt with in the context of the review of the *Coroners Act*. It does not intend to comment further on this matter pending the outcome of a current review of that Act.

Where a person with impaired decision-making capacity enters a contract

The Commission recommends that the legislation provide that:

- . the tribunal have power to declare whether a person with a decision-making disability had capacity to enter a particular contract;
- . a declaration by the tribunal that a person lacked capacity is binding in any subsequent proceedings about the contract.

The Commission recommends a review of the law relating to the contractual liability of people with a decision-making disability with a view to identifying an appropriate forum for adjudicating disputes and providing more flexible remedies to enable fairness of outcome.

Administrative responsibility

The Commission recommends that administrative responsibility for the scheme of legislation proposed by the Commission should be given to the Attorney-General and Minister for Justice.

Effect of Commission's proposals on existing law

The Commission recommends that the legislation provide that the inherent jurisdiction of the Supreme Court and, in particular, its *parens patriae* jurisdiction are not affected by the legislation.

Sanction of settlements

The Commission recommends that the legislation provide that a decision to settle a claim on behalf of a person whose decision-making capacity is impaired must be sanctioned by a court.

Protection orders

The Commission recommends that:

- . the power of the Supreme Court to make a Protection Order on the application of the Public Trustee or any other interested person should be abolished;
- . the procedure of filing a Certificate of Disability in the Supreme Court Registry should also be abolished;
- . existing Protection Orders and Certificates of Disability should continue to have effect, but should be rescinded by a tribunal order appointing a decision-maker to manage the financial affairs of the person concerned.

The Commission recommends that the legislation provide that:

- . the power of a court in an action for damages for personal injury to make a Protection Order appointing the Public Trustee to manage the damages awarded to an injured adult plaintiff should be discontinued;
- . a court which awards damages or sanctions the settlement of a claim for damages to an injured adult who, in the opinion of the court, may be a person for whom the tribunal could make a decision-making order, may make an order which:
 - . includes an order as to costs;³
 - . refers the question of management of the damages award to the tribunal;
 - . directs that -

³ Where appropriate directing taxation of costs on both a party and party and solicitor and client basis.

(lvii)

- . if the tribunal, within twenty-one days⁴ of the court order, appoints a decision-maker to manage the amount of damages, the defendant must pay the amount, less any statutory refunds, to the appointed decision-maker, whose receipt shall be sufficient to discharge the defendant;
 - . if the tribunal does not make an appointment within twenty-one days of the court order, the defendant may pay the amount, less any statutory refunds, into court and the receipt of the Registrar of the court shall be sufficient receipt to the defendant;
 - . upon lodgement with the Registrar of a copy of the tribunal order, the money paid into court be paid out, with such accretions or deductions as may be incurred, in accordance with the order of the tribunal;
- . existing Protection Orders and Certificates of Disability should continue to have effect, but should be rescinded by a subsequent order of the tribunal appointing a decision-maker to manage the person's affairs.

The Intellectually Disabled Citizens Council

The Commission recommends that the Intellectually Disabled Citizens Council and the position of the Legal Friend be discontinued.

The Commission recommends that the Volunteer Friends Program be retained as a program within the Department of Families, Youth and Community Care and be expanded to include any person with a decision-making disability, who needs personal support and friendship, whatever the cause of the decision-making disability and whether or not the person is subject to a decision-making order.

Notification under the Mental Health Act 1974 (Qld)

The Commission recommends that the powers of notification in the Fifth Schedule of the *Mental Health Act* should be abolished.

⁴ The period of twenty-one days accords with the time limit in s 48 of the *Supreme Court Act 1995 (Qld)* - previously s 73 of the *Common Law Practice Act 1867 (Qld)* - where judgment is given or an order is made by a court of record for the payment of money. Unless otherwise ordered, interest is payable after twenty-one days on so much of the money as is unpaid.

